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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 739

COLGATE-PALMOLIVE COMPANY,
Petitioner,

against

THE HONORABLE FREDERICK v.P. BRYAN, Judge of the the United States for the Southern District of New York, and all other judges and officers of said court,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

COLGATE-PALMOLIVE COMPANY,
Petitioner,
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TO THE HONORABLE THE CHIEF JUSTICE, AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner, Colgate-Palmolive Company, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled proceeding.

The Opinions Below

The opinion of the Honorable Frederick v.P. Bryan, delivered in the District Court for the Southern District of New York is reported at 232 F. Supp. 577 and is con-

tained in the printed record of the Proceedings in the Court below at pages 14-21.

No opinion was delivered by the Court of Appeals.

Jurisdiction

The judgment of the Court of Appeals sought to be reviewed was dated and entered, October 5, 1964. There has been no rehearing or extension of time to petition for certiorari. Jurisdiction of this Court is invoked under 28 U.S.C.A. Secs. 1254(1) and 2101(c).

The Question Presented

The question presented is whether under the "interest of justice" proviso of 28 U.S.C.A. Sec. 1404(a), a plaintiff's choice of a forum, foreign to her citizenship, for the convenience of medical witnesses employed for her treatment, can outweigh the deprivation to a defendant of compulsory process over necessary witnesses on both the issues of liability and injury, available only within the District where the accident occurred, where plaintiff is a citizen, and where the action could originally have been brought.

The Statute Involved

The Statute involved is 28 U.S.C.A. Sec. 1404(a), reading as follows:

> "Sec. 1404(a) Change of Venue.
>
> (a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

Statement of the Case

An action has been brought by Phyllis O. Mills, a citizen of Virginia, in the United States District Court for the Southern District of New York, to recover for personal injuries sustained by her as the result of a collision between an automobile which she was driving and one being driven by an employee of defendant, occurring within the geographical limits of the Eastern District of Virginia, Alexandria Division. In her complaint she demands damages of $2,000,000. The petitioner, the defendant in that action, moved in the District Court for removal of the action to the Eastern District of Virginia, Alexandria Division, for the convenience of witnesses and in the interest of justice. The District Court, by the Hon. Frederick v.P. Bryan, held that plaintiff's choice of forum and the convenience of physicians and nurses who treated her at Presbyterian Medical Center, New York, to which she was moved from Doctors Hospital, Washington, D. C., three weeks after the accident, outweighed the necessity for compulsory process on the part of the defendant to obtain the presence at trial of at least seven fact witnesses on the issue of liability and one medical witness, all of whom are within the subpoena power of the Alexandria Division of the Eastern District of Virginia, and none of whom are under the control of either plaintiff or defendant. The Court of Appeals for the Second Circuit has denied a petition for an order of mandamus to vacate the order denying transfer and to direct the entry of an order granting transfer as prayed for in the District Court.

Jurisdiction of the District Court for the Southern District of New York was based upon diversity of citizenship and amount in controversy.

Facts

On October 29, 1962, a collision occurred on Route 50 near Middleburg, Virginia, between an automobile being driven westerly by defendant's employee, Floyd, and an automobile being driven easterly by plaintiff. The plaintiff, who was 21 years of age at the time, resided in Middleburg, Virginia, with her parents, of which State she then was and still is a citizen. The defendant is a Delaware corporation authorized to do business in New York, and is also authorized to do business in Virginia (P.R., 14-16, 26).*

Following the accident, the plaintiff was removed by ambulance from the scene of the accident to Doctors Hospital in Washington, D. C., where she came under the care of Dr. Arthur Morris, who maintains his office at 915—19th Street, N. W., Washington, D. C., within subpoena distance of the U. S. District Court in Alexandria, Virginia (P.R., 7-8). A laminectomy had been performed by Dr. Morris (P.R., 6) and, according to the records of Doctors Hospital, the plaintiff following the operation was making an excellent recovery (P.R., 7). Contrary to his advice noted on the hospital record (P.R., 7), plaintiff on the advice of Dr. James Lawrence Pool of the Columbia Presbyterian Medical Center, New York, who examined plaintiff at Doctors Hospital at the instance of her parents, was removed by ambulance from Doctors Hospital to the Neurological Institute of Columbia Presbyterian Medical Center in New York (P.R., 15). Dr. Morris had advised against removal because, as noted in the records of Doctors Hospital, there was at that time "a complete lack of support at the level of the articular facets C6 and C7, that there was a lack of fusion and calcification" (P.R., 7).

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* References so indicated are to pages of the Printed Record of the Proceedings in the Court below.

Following plaintiff's removal to New York a second laminectomy was performed (P.R., 6) and plaintiff remained in the Presbyterian Medical Center under intensive treatment for seven months before she was discharged, still partly paralyzed and under the necessity of undergoing a course of physical therapy (P.R., 15-16).

The defendant has pleaded in its answer that plaintiff's injuries were aggravated and the damages resulting therefrom were enlarged by plaintiff's own conduct in acting contrary to competent and proper medical advice (P.R., 25). Dr. Morris has refused to come to New York to testify (P.R., 6-7).

The accident occurred on Route 50 on what is known locally as the "Dover Dips" (P.R., 10). Defendant's employee, proceeding westerly upgrade, was behind a highway truck approaching the crest of the first of these dips. He claims to have received a signal from the operator of the truck to pass the truck although a double line separated the two lanes of the highway. Proceeding out from behind the truck, he was suddenly met by plaintiff's car which had crossed the crest of the hill and was proceeding downgrade past the truck (P.R., 10-11). There were four Virginia State Highway employees in the truck (P.R., 20), three of whom were looking forward in the direction from which plaintiff was coming, the other one of whom was in the back of the truck looking behind in the direction from which defendant's employee was proceeding. All placed the accident (in statements given to plaintiff) behind the truck. (See their affidavits in the Papers in the District Court, submitted to the Court of Appeals in the Proceeding below.) Immediately following the accident, the scene of the accident was investigated by a State Highway Engineer, and a Virginia State Trooper, and plaintiff's car was removed from the accident scene by a local service station operator (P.R., 20). All of these witnesses reside within the geographical limits of the Alexandria Division of the Eastern District of Virginia

(P.R., 20). None of these witnesses is friendly to the defendant. They have refused to give statements to defendant's investigators (P.R. 20) and have testified against defendant's employee in a County Court in Loudon County, Virginia, where defendant's employee was tried on a reckless driving charge (P.R., 20).

Defendant has pleaded in its answer that plaintiff's injuries were due in whole or in part to her own fault, neglect, want of care and inattention, which would constitute, if established, a bar to her suit (P.R., 25). All of the seven aforementioned witnesses are necessary to the defendant on this issue, to establish the exact point of the collision in relation to the truck, the distance plaintiff traveled after passing the crest of the hill up to the point of collision, plaintiff's speed, the extent of visibility, the giving by the truck driver of any signal inviting passage of the truck, the road characteristics, and the length and direction of tire marks of either or both cars. Defendant's employee is also resident in the Alexandria Division of the Eastern District of Virginia. Investigations have been made and photographs of the accident scene taken on behalf of defendant by two other persons who are also resident within that District (P.R., 21).

Additionally, there are two fact witnesses cited by plaintiff who reside in West Virginia, who are not within subpoena power of either the Southern District of New York or the Eastern District of Virginia, who were driving in a car following plaintiff (P.R., 19-20).

As against the array of witnesses subject only to compulsory process within the Alexandria Division of the Eastern District of Virginia, plaintiff has cited as necessary witnesses five doctors of varying medical specialties who, together with Dr. James Lawrence Pool, the neurosurgeon who was her principal treating physician, cooperated in some phase of her medical treatment at the Columbia Presbyterian Medical Center (P.R., 18), all of whom have stated that it would be very difficult for them

to attend trial in Virginia but none of whom stated that he would refuse to do so, if necessary (P.R., 6). In addition, the plaintiff has named five nurses who attended her while an in-patient at Columbia Presbyterian Medical Center as being possible witnesses (P.R., 19). The treatment given plaintiff at New York is all the subject of extensive medical records and cannot possibly be open to dispute (P.R., 8). So far as the medical aspect of the case is concerned, the only dispute is whether the removal of plaintiff from Doctors Hospital aggravated her injuries as to which Dr. Morris and Dr. Pool are the only competent witnesses, except for possible undisclosed experts.

The papers also disclose that plaintiff was given physical therapy treatments at Middleburg, Virginia by Dr. Robert McConnell after discharge from Columbia Presbyterian Medical Center in July 1963 (see Ex. A, attached to affidavit of Dr. Pool in the Papers in the District Court), and was also examined from time to time by Dr. Robert A. Robinson of Johns Hopkins Hospital, Baltimore, also within subpoena distance of the United States District court in Alexandria, who in a report of the history given by plaintiff, indicates that she stated that the driver of the truck gave some type of passing signal, which she interpreted as intended for her (See the reply affidavit of Edmund F. Lamb in the Papers in the District Court). He also may become a necessary witness should there be a denial by the plaintiff of the history of the accident originally given by her as reported by him.

Reasons for Granting Writ

1. In denying defendant's motion to transfer this case to the United States District Court for the Eastern District of Virginia, Alexandria Division, Judge Bryan of the Southern District rested his decision upon the premises that plaintiff's choice of forum "will not be disturbed unless the balance of convenience and the interest of jus-

tice weighs heavily in favor of defendant", and that "It is the defendant's burden to overcome plaintiff's choice of forum and to demonstrate that the balance of convenience so preponderates in its favor" (P.R., 16-17). His conclusion in denying the motion was that: "Defendant has failed to show that the balance of convenience in the interest of justice weighs so heavily in its favor as to overcome the substantial weight to be given to plaintiff's choice of forum" (P.R., 21). This ruling of the District Court, which the Court of Appeals for the Second Circuit has refused to disturb on defendant's petition for mandamus, is in direct conflict with the principles applicable in applying sound judicial discretion on applications for transfer under 28 U.S.C.A. Sec. 1404(a), as enunciated by this Court in *Norwood* v. *Kirkpatrick,* 349 U. S. 29, and most recently in *Van Dusen* v. *Barrack,* 376 U. S. 612.

In *Norwood* v. *Kirkpatrick, supra,* this Court settled the conflicting views among the several Circuits as to the scope of discretion exercisable under Section 1404(a) in favor of a broader transfer than would be permissible under the *forum non conveniens* doctrine, saying (pp. 31-32):

> " 'It is perfectly clear that the purpose of this section of the Revised Judicial Code was to grant broadly the power of transfer for the convenience of parties and witnesses, in the interest of justice, whether dismissal under the doctrine of forum non conveniens would have been appropriate or not.' * * * As a consequence, we believe that Congress, by the term 'for the convenience of parties and witnesses, in the interest of justice,' intended to permit courts to grant transfers upon a lesser showing of inconvenience. This is not to say that the relevant factors have changed or that the plaintiff's choice of forum is not to be considered, but only that the discretion to be exercised is broader."

Under the *forum non conveniens* doctrine as established by this Court at the time Section 1404(a) was adopted, the plaintiff's choice of forum was given preponderant consideration, and it was held that: "But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed" (*Gulf Oil Corp.* v. *Gilbert,* 330 U. S. 501, 508). As pointed out in *Norwood,* the reason for this rule under the *forum non conveniens* doctrine was that the granting of the motion resulted in dismissal of the complaint and might result in a plaintiff being unable to successfully maintain an action because of the running of a statute of limitations in the forum deemed appropriate (349 U. S. at p. 31). It was specifically for the reason that Section 1404(a) avoided such a consequence, that it was held in *Norwood* that plaintiff's choice of forum was no longer to be treated as an overriding consideration (349 U. S. at p. 32). The rule of *Gulf Oil Corp.* above quoted, and upon which the District Court specifically almost verbatim relied, is therefore no longer applicable on motions to transfer under Section 1404(a).

That the rule of *Norwood* is still the rule of decision which should govern district courts is made eminently clear by the decision of this Court in March of this year in *Van Dusen* v. *Barrack,* 376 U. S. 612.

In that case the District Court for the Eastern District of Pennsylvania had granted motions for the transfer of actions pending in that court to the District of Massachusetts. The Circuit Court of Appeals for the Third Circuit in a mandamus proceeding had directed the vacation of the transfer order holding that the transfer could not be granted because at the time suit was brought, plaintiffs had not qualified to sue in Massachusetts. This Court granted certiorari.

The Circuit Court had reversed the District Court upon the ground that: "unless the plaintiff *had an unqualified*

right to bring suit in the transferee forum at the time he filed his original complaint, transfer to that district is not authorized by Sec. 1404(a)" (309 F. 2d at 957). The plaintiffs in that case were Pennsylvania fiduciaries representing the estates of Pennsylvania decedents and had not qualified under Massachusetts law to sue as representatives of the decedents in that State. This Court in reversing the Circuit Court and remanding to the District Court noted, citing *Norwood* v. *Kirkpatrick, supra,* that: "Section 1404(a) reflects an increased desire to have federal civil suits tried in the federal system at the place called for in the particular case by considerations of convenience and justice" (376 U. S. at p. 616), and held that the fact that plaintiffs had not qualified as personal representatives in Massachusetts did not preclude transfer to that Court despite their selection of a Pennsylvania District Court as the forum for the determination of their claims, saying (376 U. S. at pp. 623-624):

> "Finally, in construing 1404(a) we should consider whether a suggested interpretation would discriminatorily enable parties opposed to transfer, by means of their own acts or omissions, to prevent a transfer otherwise proper and warranted by convenience and justice.
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> * * * * *
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> "The possibilities thus suggested by the facts of the present case amply demonstrate that the limiting phrase of 1404(a) should be construed to prevent parties who are opposed to a change of venue from defeating a transfer which, but for their own deliberate acts or omissions, would be proper, convenient and just. The power to defeat a transfer to the convenient federal forum should derive from rights and privileges conferred by federal law and not from the deliberate conduct of a party favoring trial in an inconvenient forum."

In the cited case, referring to the decision in *Continental Grain Co.* v. *Barge FBL-585*, 364 U. S. 19, this Court quoted the language of Mr. Justice Black in that case (at p. 26) as follows:

> " 'The idea behind Sec. 1404(a) is that where a "civil action" to vindicate a wrong—however brought in a court—presents issues and requires witnesses that make one District Court more convenient than another, the trial judge can, after findings, transfer the whole action to the more convenient court.' " (376 U. S. at p. 622)

It would seem eminently clear, therefore, that this Court has clearly determined that the plaintiff's choice of forum is not entitled to any more weight than the other factors which should be considered in determining an application for transfer; that a defendant on such an application has no burden of overcoming plaintiff's choice; and that the principle upon which the District Court proceeded in denying transfer in the instant case is in conflict with the applicable principles established by this Court in applying sound, judicial discretion on such an application.

The applicable factors, apart from plaintiff's choice of forum, were set down by this Court in *Gulf Oil Corporation* v. *Gilbert*, 330 U. S. 501 at pages 508-509, as follows:

> "Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive.
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> • • • • •
>
> "Factors of public interest also have place in applying the doctrine. Administrative difficulties follow for courts when litigation is piled up in congested

> centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. * * * There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself."

And at page 511:

> "Certainly to fix the place of trial at a point where litigants cannot compel personal attendance and may be forced to try their cases on deposition, is to create a condition not satisfactory to court, jury or most litigants. Nor is it necessarily cured by the statement of plaintiff's counsel that he will see to getting many of the witnesses to the trial and that some of them 'would be delighted to come to New York to testify'."

In the instant case, the District Court not only gave no consideration to any of these factors, but moreover completely disregarded the final admonition in the above quoted statement of this Court (P.R., 20).

2. The affirmance by the Court of Appeals of the decision of the District Court denying removal is in substantial variance with the basic principles for the exercise of sound judicial discretion on such motions enunciated by the Courts of Appeals in the Fifth Circuit in *Koehring Co.* v. *Hyde Construction Co.*, 324 F. 2d 295, the Seventh Circuit in *Chicago, Rock Island & Pacific Railroad Co.* v. *Igoe*, 220 F. 2d 299, cert. den., 350 U. S. 822, the Fourth Circuit in *Southern Railway Company* v. *Madden*, 235 F. 2d 198, cert. den., 352 U. S. 953, and in the Sixth Circuit in *Lemon* v. *Druffel*, 253 F. 2d 680, cert. den. 358 U. S. 821.

In *Koehring Co.* v. *Hyde Construction Co., supra,* the Fifth Circuit adopted and applied the rule of the Seventh Circuit set forth in *Chicago, Rock Island & Pacific Railroad Co.* v. *Igoe, supra,* to the effect that the interest of justice provision of Section 1404(a) should be given paramount consideration, and that in weighing the interest of justice " 'there should be considered the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing witnesses; the posibility of a view of the premises; and the state of the court calendar both in the District where the case is pending, and in the District to which it is sought to have the case transferred.' " (324 F. 2d 297).

In *Chicago, Rock Island & Pacific Railroad Co.* v. *Igoe, supra,* the Court of Appeals for the Seventh Circuit ordered the transfer of a cause from the Northern District of Illinois to the Southern District of Iowa involving an automobile collision which occurred in Iowa where the plaintiffs were resident at the time of the accident, although the plaintiffs had since moved to Illinois where the defendant's main office was shown to be, stating again the factors enumerated in *Gulf Oil* v. *Gilbert,* above quoted, and stressing that on a motion under Section 1404(a) the district court in its exercise of discretion must follow the statutory test of " 'convenience of parties and witnesses, in the interest of justice' " (220 F. 2d at p. 302). The Court further pointed out that the statutory test, "in the interest of justice" connotes conditions which are in furtherance of the administration of justice, and that this phrase "should be given paramount consideration." (*id.* p. 303).

In *Southern Railway Company* v. *Madden,* 235 F. 2d 198, the Court of Appeals for the Fourth Circuit on an appeal after the case was twice tried in the United States District Court of Columbia, South Carolina, reversed a judgment and directed a new trial and transferred the

case to the Western District of North Carolina at Charlotte, where the accident had occurred, saying (at p. 200):

> "On the question of transfer, it appeared not only that the plaintiff's injury occurred in Charlotte, North Carolina, and that the question of liability was governed by North Carolina law, but also that all of the witnesses to the occurrence and to the treatment of plaintiff in a Charlotte hospital following his injury lived in Charlotte, except one who had moved to West Virginia, and that a view of the locus in quo by the jury, which would be of importance in the trial of the case, could reasonably be had only if the case were tried in Charlotte. Furthermore, it appeared that the plaintiff was not a resident of Columbia, S. C., where the case was brought, or even in that judicial district, but of Anderson, S. C., a town in another judicial district and approximately as far from Columbia as from Charlotte, and that no one would be convenienced by a trial in Columbia except plaintiff's attorneys, a photographer who lived in Florence, S. C. and who had been employed to take photographs of the Charlotte railroad yard, and a surgeon and hospital attendants in a Florence hospital where plaintiff had been treated several months after his injury. The question of transfer under 28 U.S.C. Sec. 1404(a) was, of course, a matter resting in the sound discretion of the District Judge; but we cannot imagine a case more clearly calling for the exercise of the power of transfer conferred by the statute; and not to transfer it was, we think, not a sound exercise of discretion."

In *Lemon* v. *Druffel, supra,* the Court of Appeals for the Sixth Circuit on a petition for mandamus, in a case not unlike the case at bar, sustained an order transferring the case under Section 1404(a) from the District Court at Cincinnati, Ohio, to the District Court for the Eastern District of Kentucky at Catlettsburg. The accident hap-

pened approximately four miles from the locus of the District Court at Catlettsburg and the principal witnesses resided either within the geographical limits of that court or in nearby West Virginia. Plaintiff's opposition was based upon the convenience of medical witnesses who subsequently treated him and performed an operation upon him at Christ Hospital in Cincinnati.

The Court of Appeals for the Second Circuit in denying mandamus in the present case necessarily affirmed the principles upon which Judge Bryan proceeded in exercising discretion to deny transfer, and its decision thereby sets the rules of decision in the Second Circuit on a transfer application under 1404(a) at variance with the rules of decision enunciated by at least the Fifth, Seventh, Fourth and Sixth Circuits in the cases above referred to.

3. The denial by the Court of Appeals for the Second Circuit of an order of mandamus in this case has so far sanctioned such a departure by the United States District Court for the Southern District of New York from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

By the decision of the District Court denying defendant's motion to transfer, defendant has been placed in the position of being forced to try a matter of purely local concern to the Eastern District of Virginia in a metropolitan court foreign to the individuals involved in the accident out of which the injury arose, foreign to the locale of the accident, and without the benefit of compulsory process over even a single witness of any value to it in the defense of its case; it has been left wholly stripped of any power of defense except such as may be available through plaintiff's voluntary production of witnesses; it has in effect been prejudged on the issue of liability and left subjected to trial before a cosmopolitan jury, having no interest or concern with the litigation or the parties, upon the question of the quantum of damage.

CONCLUSION

In view of the considerations hereinabove set forth, petitioner respectfully submits that this petition should be granted and a writ of certiorari issue to the United States Court of Appeals for the Second Circuit to review the judgment entered by it in the above entitled proceeding.

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